(5)

No. 89-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY,
Survivor of JOHN C. PAULEY,

Petitioner,

vs.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF PETITIONER IN REPLY

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ARGUMENT

Respondents Bethenergy Mines, Inc. ("Bethenergy") and the Director, Office of Workers Compensation Programs ("Director") both agree that the questions petitioner Pauley presents here merit plenary review. Bethenergy Resp. Br. at 2; Dir. Resp. Br. at 5. They also agree that it would be appropriate to resolve these questions by granting plenary review in this case. Bethenergy Resp. Br. at 2; Dir. Resp. Br. at 9-10. Bethenergy and the Director differ only with respect to which other pending petition(s) for certiorari this Court should consolidate with this case, or might select instead of this case, as the vehicle for resolving the circuit conflict involving the validity of the rebuttal provisions of the DOL interim regulation at 20 C.F.R. §§ 727.203(b)(3) and (b)(4) (the "§§ (b)(3)/(b)(4) issue").

A. Bethenergy urges this Court to grant certiorari in, and consolidate, all the pending cases (now totalling five), including this one, that are part of the circuit conflict respecting the §§ (b)(3)/(b)(4) issue. Bethenergy Resp. Br. at 2, 17; Dir. Resp. Br. at 6-8 (citing cases). In contrast, the Director's response in this case urges the Court to resolve the issue by granting review in only one of the pending cases. Dir. Resp. Brief at 9-10.[1] Moreover, the Director's

[1] The Director's position in the other four pending cases that present the §§ (b)(3)/(b)(4) issue also appears to be that this Court should grant review in only one such case. Dir. Resp. Br. in *Peabody Coal Co.* (No. 89-1696) at 12-13; Dir. Pet. for Cert. in *Robinette* (No. 90-172) at 6; Dir. Resp. Br. in *Clinchfield Coal Co.* (No. 90-113) at 7; Dir. Resp. Br. in *Dayton* (No. 90-114) at 7. To be sure, the Director additionally suggests in footnote 3 of his response to the petition in *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114), that the Court "may wish" to grant review in two cases raising the §§ (b)(3)/(b)(4) issue—this case

(Footnote continued on following page)

position here now appears to be that this case is "the most appropriate vehicle for resolution of the existing conflict." Dir. Resp. Brief at 9.

To be sure, when the Director first set forth that view, it was conditional on the possible effect of "one . . . question." *Id.* However, that question has now been removed from the case. It arose because a motion to substitute petitioner Harriet Pauley for her late husband was not filed in the proceedings below after he died. Although the Director questioned whether she could nonetheless seek review of the court of appeals' judgment because she was not formally denominated a party in the proceedings below, he hastened to express his belief that she could because she automatically succeeded to her husband's claim to benefits when he died. *Id.* (citing 30 U.S.C. § 932(l) and 20 C.F.R. § 725.212, and stating that "Mrs. Pauley is the proper party. . . ."). Moreover, to protect against the possibility that this Court might nevertheless find this substitution issue troublesome, the Director took the precaution of filing with the Board his own motion, which Bethenergy and Mrs. Pauley both joined, seeking substitution of Mrs. Pauley for her late husband *nunc pro tunc* as of the date of Mr. Pauley's death. The Board recently granted this motion on August 14, 1990. Dir. Sup. Br. at 5a. Accordingly, the substitution issue no longer presents any conceivable impediment to this Court's granting plenary review here.[2]

[1] *continued*
(*Bethenergy Mines*) and *Dayton*. But he qualifies that suggestion by expressing his belief, with which we agree, that granting review in both cases would not be necessary. Dir. Resp. Br. in *Dayton* (No. 90-114) at 7.

[2] Even absent the Board's order, there would have been no impediment to Mrs. Pauley's seeking review of the court of appeals' judgment. Because Mrs. Pauley remained statutorily eligible for

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Because the Director's response here was filed before the Board entered its order substituting Mrs. Pauley for her late husband, it still allowed for the possibility that, because of the substitution issue, "the Court may wish to hold this case and to grant plenary review in one of the Fourth Circuit cases," *Dayton* in particular. Dir. Resp. Br. at 9 and n.4. While the Board's recent substitution order has eliminated the Director's proffered reason for holding this case, the Director has persisted in his view that *Dayton*, like this case, would be an appropriate vehicle for resolving the §§ (b)(3)/(b)(4) issue. Dir. Resp. Br. in *Dayton* (No. 90-114) at 5-7.

[2] *continued*
benefits on her husband's claim without having to file a new claim or refile or otherwise revalidate his claim after he died, 30 U.S.C. § 932(l); 20 C.F.R. § 725.212, the Act effected an automatic substitution of Mrs. Pauley as a claimant before the Benefits Review Board, where she prevailed. To be sure, this automatic substitution of Mrs. Pauley *qua* claimant did not make her a formal "party" to the proceedings below. But *Karcher v. May*, 484 U.S. 72, 77 (1987), which the Director cites, Dir. Resp. Br. at 9, indicates, and the cases it cites with approval state, that one need not formally be denominated a party to a court of appeals' judgment to seek review of it. Rather, the rule is that to seek review of a judgment one must either be a party to it "or [be] privy to the record [party]," *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917), or "represent" the record party. *Ex Parte Cutting*, 94 U.S. 14, 21 (1877). The survivor provisions of the Act establish that Mrs. Pauley was her late husband's (the record party's) "representative" and that she was "privy" to him.

Finally, while it would have been the better practice for Mrs. Pauley's attorneys to have filed a substitution motion after Mr. Pauley died, it does not appear that they transgressed any applicable procedural rule by not doing so. The rules of "practice and procedure" before the Board, 20 C.F.R. Part 802, do not expressly require the survivor of a claimant who dies while his case is pending before the Board to substitute herself or himself for the deceased party before the Board. Similarly, Fed. R. App. P. 43(a) anticipates only that the personal representative of a party who dies *after* a notice of appeal to the court of appeals has been filed will then file a substitution motion. Mr. Pauley died *before* the coal company filed its notice of appeal in the court below.

B. Petitioner Pauley agrees with the Director that this Court should not grant review in all five of the pending cases to resolve the circuit conflict respecting the §§ (b)(3)/(b)(4) issue, as Bethenergy urges. Granting review in all five pending cases presenting the issue would be both extremely unmanageable for the Court and unduly burdensome for the parties, involving a multitude of briefs on the same and similar issues by as many as ten different parties.

However, we disagree with the Director's suggestion that *Dayton*, like this case, would be an appropriate case for resolving the §§ (b)(3)/(b)(4) issue. First, the coal company in *Dayton* did not raise the related constitutional issue before the Fourth Circuit, which, therefore, declined to address it. *Dayton*, 895 F.2d at 175-76. As "ordinarily, this court does not decide questions not raised or involved in the lower court," *Youakim v. Miller*, 425 U.S. 231, 234 (1976), the constitutional issue is one unlikely to be resolved in *Dayton*.[3]

Second, *Dayton* is an interlocutory ruling since the court of appeals there remanded the case for consideration of whether the employer rebutted the presumption under § 727.203(b)(2). This factor normally counsels strongly against review. *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893) (review of interlocutory orders inappropriate "unless it is necessary to prevent extraordinary inconvenience and embarrassment in

[3] The Director maintains that he had standing to defend the *statutory* validity of the DOL rebuttal provisions by reference to the argument that invalidation of one or more of the provisions would raise "a serious due process question." Dir. Resp. Br. in *Dayton* (No. 90-114) at 6 and n.2. But he does not argue that the *constitutional* issue the coal company in *Dayton* proffers to the Court (as the second question in its petition), notwithstanding its failure to raise the issue below, is one now properly before this Court or one this Court would likely resolve in *Dayton*.

the conduct of the cause"). Significantly, the Director, despite acknowledging this impediment to the Court's review in *Dayton*, points to no unusual factors that would justify granting the writ in *Dayton* notwithstanding the interlocutory posture of that case, especially when the §§ (b)(3)/(b)(4) issue is clearly presented in *this* case, in which the court of appeals' ruling is not interlocutory.

Moreover, we submit that the single case selected should be one of the cases in which the miners invoked the interim presumptions by x-ray evidence ("x-ray cases"), §§ 410.490(b)(1)(i), 727.203(a)(1), *not* one of the cases in which the miners invoked the interim presumptions either by ventilatory study evidence ("ventilatory study cases"), §§ 410.490(b)(1)(ii), 727.203(a)(2), or by blood gas study evidence ("blood gas study cases"). § 727.203(a)(3). Because *Dayton* is a ventilatory study case, not an x-ray case, it is not an appropriate vehicle for resolving the §§ (b)(3)/(b)(4) issue. In contrast, this case is an x-ray case and, we submit, the most appropriate case for plenary review of the §§ (b)(3)/(b)(4) issue.

1. Our contention that this Court should resolve the circuit conflict respecting the §§ (b)(3)/(b)(4) question by granting review in an x-ray case, rather than in a ventilatory study or blood gas study case, is based on several interrelated factors. First, if the §§ (b)(3)/(b)(4) issue is to be resolved by this Court, it should be resolved on a factual record representative of the majority of cases in which claimants successfully invoke the interim presumptions. The overwhelming majority of such cases are x-ray cases.

Second, this Court's resolution of an x-ray case, at least if that resolution is adverse to the claimant's position, would resolve not only all other x-ray cases but all ventilatory study and blood gas study cases as well. We are unaware of any argument relating to the validity of § (b)(3) or § (b)(4) that an opponent of a claim in an x-ray case

has advanced that, if successful, would not also defeat claims in all ventilatory study and blood gas study cases.

Conversely, this Court's resolution of a ventilatory study or blood gas study case might not resolve the far more prevalent x-ray cases. This is because, while the opponents of the claims in the pending ventilatory study case (*Dayton*) and the pending blood gas study case (*Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-1696)) have both advanced all the arguments in support of the validity of the §§ (b)(3) and (b)(4) rebuttal provisions that the opponents of the claims in the pending x-ray cases have advanced, there are additional arguments that they may advance that do not pertain to x-ray cases. For example, the coal company and the Director both argue in *Clinchfield* that, as to blood gas study cases, the DOL interim regulation cannot be more restrictive than the HEW interim provision in any respect because the HEW interim provision does not even allow a claimant to invoke the presumption by blood gas study evidence. Petition for Cert. in *Clinchfield* (No. 90-113) at 12; Dir. Resp. Br. in *Clinchfield* (No. 90-113) at 6. As the Director has correctly pointed out, if the Court granted certiorari in *Clinchfield*, and then adopted this argument, it would not need to reach any of the questions decisive of either the x-ray cases or the ventilatory study cases. *Id.*

Similarly, the opponents of claims in ventilatory study cases have an argument that, if adopted, would resolve ventilatory study cases but not x-ray cases. The argument turns on the function of § 410.490(b)(3), which, by its express terms, applies only to ventilatory study cases. If § 410.490(b)(3) did not exist, the HEW interim provision could be read to require affirmative proof of all elements of a claim in ventilatory study cases. According to that reading, absent § 410.490(b)(3), claimants would have to

submit evidence proving under § 410.490(b)(2) that the respiratory impairment shown by their ventilatory studies, § 410.490(b)(1)(ii), "arose out of coal mine employment." § 410.490(b)(2). This would be so because claimants who meet only the ventilatory study standards at § 410.490(b)(1)(ii) have not proven that they have pneumoconiosis, a requirement necessary to obtain the benefit of the presumption of causation set forth in §§ 410.416 and 410.456, the sections cross-referenced in § 410.490(b)(2).

If such claimants did prove under § 410.490(b)(2) that the respiratory impairments shown by their ventilatory studies arose out of coal mine employment, they would establish that they have the disease "pneumoconiosis," as § 402(b) of the Act, 30 U.S.C. § 902(b), defines it, and, *per force*, that their pneumoconiosis arose out of coal mine employment (*i.e.*, the "disease causation" element) and that their pneumoconiosis contributes to their presumptively disabling respiratory impairment (*i.e.*, the "disability causation" element). Such proof would invoke the presumption that the impairment shown by their ventilatory studies is severe enough to be "totally disabl[ing]," § 410.490(b), the element that the opponents of their claims would have the opportunity to rebut under §§ 410.490(c)(1) and (c)(2). Thus, according to the posited reading of the HEW interim provision, if § 410.490(b)(3) were absent, the provision would, as to ventilatory study cases, include all the criteria the DOL interim regulation includes. Consequently, the DOL interim regulation would not be more restrictive than the HEW interim provision in ventilatory study cases, and, as to such cases, would comply with Section 402(f)(2) of the Act.

Section 410.490(b)(3), however, *does* exist. Claimants have the argument, with which we agree, that § 410.490(b)(3) supersedes (or is an alternative route satisfying the requirements of) § 410.490(b)(2) and provides claimants in

ventilatory study cases with an *irrebuttable* presumption that the respiratory impairments shown by their ventilatory studies arose out of coal mine employment. On the other hand, opponents of claims might argue that § 410.490(b)(3) simply places the burden on them in ventilatory study cases to submit evidence negating the § 410.490(b)(2) requirement that the miners' respiratory impairments arose out of coal mine employment. Under the latter interpretation of § 410.490(b)(3), but not under the former, the HEW interim provision would still require one party or the other to present evidence proving or negating all elements of a claim in ventilatory study cases. Consequently, as to ventilatory study cases, the DOL interim regulation would not be more restrictive than the HEW interim provision and would not violate Section 402(f)(2) of the Act. Thus, the latter interpretation of § 410.490(b)(3), if accepted by this Court in a ventilatory study case, would make it unnecessary for the Court to decide the §§ (b)(3)/(b)(4) issue with respect to the far more prevalent x-ray cases, as to which the DOL rebuttal provisions clearly *do* set forth more restrictive criteria than those found in the HEW interim provision.

2. We submit that this case is the most appropriate of the three pending x-ray cases for plenary review. The Director agrees. Dir. Resp. Br. at 9. This case squarely presents both the statutory §§ (b)(3)/(b)(4) issue and the constitutional issue related to it. In contrast, neither of the other x-ray cases squarely presents both issues. We now agree with the respondent claimant in *Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. pending*, No. 89-1696 (filed August 9, 1990), that the portions of the court of appeals' opinion in that case addressing the §§ (b)(3)/(b)(4) statutory issue and the related constitutional issue are *dicta*, Respondent Taylor Op. Cert. Br. at 26-27, a factor that makes *Peabody* a less appropriate case than this one for resolving those issues. *See Stickel v. United States*, 76 S. Ct. 1067, 1068 (1956) (Harlan, J., denying application for stay). Similarly, while *Robinette v. Director, O.W.C.P.*, 902 F.2d 1566 (4th Cir. 1990) (table), *petition for cert. filed*, 59 U.S.L.W. 3073 (U.S. July 25, 1990) (No. 90-172), presents the statutory issue adequately, it does not present the related constitutional issue at all since the Director, a governmental official, is the only party opposing that claim. We also agree with the Director's observation, in his petition in *Robinette* (No. 90-172) at 6, that the coal companies should be able to participate in any case in which this Court grants plenary review of the §§ (b)(3)/(b)(4) issue.[4]

[4] While both *Peabody* and *Robinette* are therefore less appropriate vehicles for resolution of the §§ (b)(3)/(b)(4) question than is this case, we submit that, as x-ray cases, both are more appropriate cases for resolution of this question than is *Dayton* or any other non-x-ray case. Between *Peabody* and *Robinette*, we submit that *Peabody*—where the constitutional question is presented, albeit in *dicta*, and a coal company is a party—is a stronger candidate for plenary review than is *Robinette*.

CONCLUSION

The petition for certiorari here should be granted.

Respectfully submitted,

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